

1 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
2 **STATE OF WASHINGTON**

3 **THOMAS DEERING,**)

4 **Appellant,**)

5 **v.**)

6 **OLYMPIC AIR POLLUTION**)
7 **CONTROL AUTHORITY,**)

8 **Respondent.**)

PCHB NO. 93-124

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

9 This matter came before the Pollution Control Hearings Board ("Board") on an appeal
10 by Deering and Nelson, Inc. ("Deering") of two Notices of Civil Penalty Assessment they
11 received from Olympic Air Pollution Control Authority ("OAPCA").

12 A hearing was held by the Board in Lacey on September 24, 1993. Present for the
13 Board were Robert V. Jensen, Chairman, and Richard C. Kelley, Member, who presided.
14 Deering was represented by Thomas A. Deering, President. OAPCA was represented by
15 Fred Gentry, Attorney. The proceedings were recorded by Betty Koharski, of Gene Barker &
16 Associates, Olympia.

17 Witnesses were sworn and heard. exhibits were introduced, and both parties presented
18 arguments to the Board. Based on the evidence presented, the Board makes the following

19 **FINDINGS OF FACT**

20 **I**

21 On March 8, 1993, Kenneth Martin, a volunteer Ranger with the Lacey Fire
22 Department, witnessed an open fire containing plywood, pressboard and construction
23 materials, measuring approximately 5 feet by 6 feet, on a site at the southwest corner of
24 Marvin and Pacific. He issued a citation to Mike Nelson, vice-president of Deering.

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27 **FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

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2 II

3 On April 4, 1993, acting on a citizen complaint, Ronald Wilbur, volunteer Ranger with
4 the Lacey Fire Department, visited the same site and witnessed an open fire of approximately
5 4 feet by 4 feet, containing particle board, asphalt roofing shingles, and other construction
6 debris. He spoke with Dave Shepherd, who was a subcontractor to Deering, and who was in
7 control of the fire. Wilbur issued a citation.

8 III

9 On June 8, 1993, OAPCA Control Officer Charles E. Peace issued a Notice of Civil
10 Penalty Assessment to Deering, with a penalty of \$100, for the March 8 fire. On the same
11 date, Peace also issued a Notice of Civil Penalty Assessment to Deering, with a penalty of
12 \$1,000, for the April 4 fire.

13 IV

14 On June 17, 1993, Deering filed an appeal with the Board, which appeal was timely.

15 V

16 Deering admits the fires occurred as cited, denies the prohibited materials in the March
17 8 fire, and does not dispute the materials being burned in the April 4 fire.

18 VI

19 Deering owned the site at which both violations occurred, and also is its own general
20 contractor for the development. It was at all times in overall control of the site. It
21 subcontracted with others for certain services in connection with the development.

22 VII

23 Dave Shepherd, a framing subcontractor to Deering, testified that he set the April 4
24 fire, did not recall any asphalt shingles, but did recall particle board and wafer board.

VIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.
From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

The Board has jurisdiction in this matter under RCW 42.21B.310 and RCW 70.94.

II

OAPCA has the initial burden of proof in this appeal of a civil penalty, and has proven that the violations cited did occur.

III

Deering was the owner and general contractor and in control of the property where the violations occurred. They contend that the April 4 fire, which was set by one of their subcontractors, was therefore not Deering's responsibility. We disagree.

RCW 70.94.040 provides that:

...it shall be unlawful for any person to cause air pollution or permit it to be caused in violation of this chapter, or of any ordinance, resolution, rule or regulation validly promulgated hereunder.

The Board has consistently held that a contractor's proximate causation of air pollution does not relieve the owner of any responsibility.

The Washington Clean Air Act is a strict liability statute. Acts violating its implementing regulations are not excused on the basis of intent. Moreover, the duty to comply cannot be delegated away by contract. Pearson Construction v. PSAPCA, PCHB No.88-186 (1989).

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2 One may feel, as expressed by Dave Shepherd in his testimony, that this strict liability
3 statute puts a contractor between Scylla and Charybdis. The contractor's labor required by the
4 law, however, is hardly Herculean: he must merely know his construction materials well
5 enough to know which are illegal to burn, and make sure neither he nor his subcontractors
6 burn them.

7 We conclude that Deering was responsible for both fires.

8 IV

9 OAPCA Regulation 1, Section 9.01(g)(1) prohibits any fire:

10 *(1) Containing garbage, dead animals, petroleum*
11 *products, paints, rubber products, plastics, or any*
12 *substance which normally emits dense smoke or*
obnoxious odors..[an allowed exception does not
apply in this case].

13 We find that the materials proven to have been burned in both fires were prohibited
14 under the above section.

15 V

16 Deering argued that they had received no notice of OAPCA's adoption of the
17 regulation which Deering was cited for violating. We find that OAPCA's adoption of
18 Regulation 1, Article 9 on November 4, 1970, in public meeting with prior public notice, and
19 its several later amendings of Article 9 with similar public notice, along with its publication of
20 its Regulations from time to time and in the manner required by law, constitutes adequate
21 notice to all citizens of their obligations under OAPCA regulations.

22 VI

23 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
24 From the foregoing, the Board issues this.

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2 **ORDER**

3 The two Notices of Civil Penalty Assessment issued by OAPCA to Deering and
4 Nelson, Inc., on June 8, 1993, with penalties of \$100 and \$1,000, respectively, are affirmed.

5 DONE this 30 day of September, 1993.

6 **POLLUTION CONTROL HEARINGS BOARD**

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8
9 RICHARD C. KELLEY, Presiding

10 
11 ROBERT V. JENSEN, Chairman

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